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In The

# Supreme Court of the United States

October Term, 1991

DAN MORALES, ATTORNEY GENERAL OF TEXAS,

*Petitioner,*

vs.

TRANS WORLD AIRLINES, INC., et al.,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## BRIEF AMICI CURIAE OF THE STATES OF HAWAII, ALABAMA, INDIANA, LOUISIANA, MISSISSIPPI, NEW JERSEY, NEW MEXICO, PENNSYLVANIA, UTAH AND VIRGINIA IN SUPPORT OF PETITIONER

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The amici States enumerated above, by their respective Attorneys General, submit this brief in support of reversal of the judgment of the United States Court of Appeals for the Fifth Circuit entered in the proceeding below on January 18, 1991.

## INTEREST OF AMICI CURIAE

The amici States have a significant interest in seeing that they have the right to enforce their own state false and deceptive advertising laws against airlines that engage in unfair and deceptive airline advertising practices in order to protect their citizens from the obvious harm such advertising brings. If the decision of the Fifth Circuit is allowed to stand, the amici States, indeed all States, may be barred from protecting their citizens from deceptive airline advertising. Such an evisceration of the States' historic police powers to engage in consumer protection cannot be upheld absent a clear and manifest mandate of Congress to that effect, a mandate that was clearly lacking in this case.

## ARGUMENT

### I. The Fifth Circuit's Holding that State False and Deceptive Advertising Laws are Preempted is Plainly Wrong as a Matter of Law and Conflicts with Decisions of this Court and Other Courts.

In *Nader v. Allegheny Airlines*, 426 U.S. 290 (1976), this Court held that § 411(a) of the Federal Aviation Act, 49 U.S.C. § 1381(a), authorizing the Civil Aeronautics Board (CAB) to issue cease and desist orders against unfair or deceptive practices or unfair methods of competition, did not impliedly preempt state common-law tort actions for fraudulent misrepresentation by an air carrier. In allowing state law causes of action to proceed, this Court stated that "§ 411(a) confers upon the Board a new and



powerful weapon against unfair and deceptive practices that injure the public. But it does *not* represent *the only*, or best, response to all challenged carrier actions that result in private wrongs." 426 U.S. at 303 (emphasis added). By analogy therefore, § 411(a) does not preempt State false and deceptive advertising laws. Even if a particular airline advertising practice does not constitute an unfair or deceptive practice under § 411(a), the states would still be allowed to enforce their own false and deceptive advertising laws against the practice. *Cf. Nader*, 426 U.S. at 301-02 ("No power to immunize can be derived from the language of § 411. . . . Section 411 is both broader and narrower than the remedies available at common law.").

Although the federal preemption provision, § 105(a)(1) of the Federal Aviation Act, 49 U.S.C. § 1305(a)(1), was not enacted at the time of *Nader* (being added in the Airline Deregulation Act of 1978), § 411(a) has remained essentially unchanged, except for the fact that the Department of Transportation, and not the Civil Aeronautics Board, is now the federal governmental body responsible for monitoring unfair and deceptive practices in the airline industry. Therefore, *Nader's* holding of no implied § 411 preemption of state laws concerning unfair and deceptive practices is still the law today.

Because any implied preemption argument was foreclosed by *Nader*, the Fifth Circuit instead based its decision on an erroneous interpretation of the § 105(a)(1) preemption provision added by the Airline Deregulation Act, which states:

> [No] state . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to *rates, routes or services* of any air carrier having authority under subchapter IV of this chapter to provide air transportation.

§ 105(a)(1) (emphasis added). Because the states in the exercise of their police powers have historically and traditionally been the primary regulators in the area of consumer protection, preemption of such matters will not be found unless that is the "clear and manifest purpose" of Congress. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Not only can no clear and manifest purpose of Congress to preempt state regulation of false and deceptive advertising practices be discerned in either the plain language of § 105(a)(1) or its legislative history, but in fact the plain language and history actually suggest the exact opposite.

Section 105(a)(1), by its plain language, only preempts laws directly relating to *rates, routes* or *services*, and not laws controlling the *advertising* of rates, routes or services. *See People v. Western Airlines*, 155 Cal.App.3d 597, 600, 202 Cal.Rptr. 237, 238 (1984) *cert. denied*, 469 U.S. 1132 (1985); *Kansas v. Trans World Airlines*, 730 F.Supp. 366, 368 (D.Kan. 1990). Had Congress intended to preempt State false and deceptive advertising laws, it could have easily done so by simply adding the phrase, "or the advertising thereof." The States' false and deceptive advertising laws are not intended to, and do not in fact, determine anything at all with regard to what airlines charge, what routes they take, or what services they provide. State false and deceptive advertising laws



merely ensure that whatever the rates, routes and services the airlines choose to have, which amici States concede they may not regulate, that they are not deceptively advertised in the free market. *See New York v. Trans World Airlines*, 728 F.Supp. 162, 176 (S.D.N.Y. 1989). The Fifth Circuit's attempt to construe "relating to rates, routes, or services" to encompass advertising is thus unwarranted.

The Fifth Circuit's heavy reliance on *Shaw v. Delta Air Lines*, 463 U.S. 85 (1983), is misplaced. In *Shaw*, this Court held that a New York Human Rights Law forbidding discrimination in employee benefit plans on the basis of pregnancy was preempted by a federal ERISA provision superseding all State laws "relat[ing] to any employee benefit plan." It was obvious in that case that the anti-discrimination provision would *directly* affect the *substantive* content of employee benefit plans and thus clearly "related to" employee benefit plans. Employers subject to the law would be substantively constrained in setting up their benefit plans. Here, however, the regulation of the advertising of rates does *not* directly affect the substantive rates themselves. The airlines are free to charge whatever they wish, regardless of any state deceptive advertising restrictions. Thus, *Shaw* is wholly inapposite.

To the extent State penalties or injunctions on deceptive airline advertising or the adoption of practices by an airline to avoid such state enforcement actions indirectly affect rates, such an impact on rates would be merely *incidental*. As this Court stated in the exactly analogous situation in *Nader*, "any impact on rates that may result from the imposition of tort liability or from practices adopted by a carrier to avoid such liability would be

merely incidental." 426 U.S. at 300; *see also Western Airlines*, 155 Cal.App.3d at 600, 202 Cal.Rptr at 239.

The Ninth Circuit has properly rejected the sort of overly expansionist reading of § 105(a)(1)'s "relating to" language at the root of the Fifth Circuit's decision. *See, e.g., West v. Northwest Airlines*, 923 F.2d 657, 660 (9th Cir. 1990); *Air Transport Ass'n of America v. Public Utilities Comm'n*, 833 F.2d 200, 207 (9th Cir. 1987), *cert. denied*, 487 U.S. 1236 (1988).

The legislative history also unambiguously supports the position that § 105(a)(1) was only intended to preclude state laws that directly impact rates, routes or services, and not laws regarding the deceptive advertising of those matters. There is no reference in the legislative history to § 105(a)(1) that even mentions airline advertising. The section was enacted with the intent of providing for exclusive federal control of airline rates, routes and services, with such federal control to be limited in the context of deregulation. It would, of course, have been inconsistent with deregulation to allow the states to simply fill the void left by federal deregulation. Hence, § 105(a)(1) was needed to prevent any attempts by the states to regulate airline rates, routes or services. But state regulation of airline *advertising*, so long as the state does not attempt to affect or determine the rates, routes, or services themselves, does not in any way interfere with Congress' goal of deregulation of airline rates, routes, and services.

In enforcing their deceptive advertising laws against the airlines, the States have no interest in what the airlines charge, but only seek to ensure that the airlines represent their charges fairly and nondeceptively. The Fifth Circuit's only other argument to support its



overbroad construction of § 105(a)(1), outside of the flawed *Shaw* analogy, is essentially an implied § *411* preemption argument. It notes, for example, that the CAB's § 411 powers were not terminated under the Airline Deregulation Act, but rather were eventually transferred by operation of law to DOT, and somehow concludes that Congress thereby intended to protect consumers by providing a uniform system of federal regulation of unfair or deceptive practices by airlines. *See Trans World Airlines v. Mattox*, 897 F.2d 773, 782-83 (5th Cir. 1990). This, of course, is the very same implied preemption argument flatly rejected by this Court in *Nader*. *See supra* pp. 2-3. The only uniformity that Congress intended was in connection with rates, routes and services, *see* H.R. Rep. No. 1211, 95th Cong., 2d Sess., *reprinted in* 1978 U.S. Code Cong. & Admin. News 3737, 3751-52, but with regard to deceptive *advertising*, Congress allowed both a federal and state presence. *Cf. Nader* (allowing state common law misrepresentation claim to coexist with § 411).

In sum, not only was this Court's stringent preemption standard of a "clear and manifest purpose" of Congress not satisfied with regard to preemption of state deceptive advertising laws, but if there was any clear Congressional intent at all regarding airline advertising, it was that the states should be free to enforce their deceptive advertising laws.

Besides the clear import of this Court's own decisions demonstrating that preemption here is not warranted, other courts have properly and explicitly rejected § 105(a)(1) preemption of state deceptive advertising laws, in direct contradiction to the Fifth Circuit's decision. *See, e.g., People v. Western Airlines*, 155 Cal.App.3d

597, 202 Cal.Rptr. 237 (1984); *Kansas v. Trans World Airlines*, 730 F.Supp. 366, 368 (D.Kan. 1990); *New York v. Trans World Airlines*, 728 F.Supp. 162, 176 (S.D.N.Y. 1989).[1]

In short, the Fifth Circuit's decision deprives all the States of the ability to protect their citizens from the direct injury caused to consumers from deceptive advertising and the broader economic damage to the efficiency of a marketplace forced to operate with deceived market participants. Because Congress clearly did not intend § 105(a)(1) to have that effect, its goal being solely deregulation of rates, routes, and services, and not deregulation of *deceptive advertising* of the former, the Fifth Circuit plainly erred.

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[1] *See also Alaska v. U.S. Dep't of Transportation*, 868 F.2d 441 (D.C. Cir. 1989) (*implicitly* rejecting § 105(a)(1) preemption). The State of Alaska was held to have standing to challenge various DOT airline advertising rules (on the ground that the rules were not adopted pursuant to proper notice-and comment procedures) because the rules would conflict preempt state deceptive advertising laws. If § 105(a)(1) expressly or impliedly preempted *all* state deceptive advertising laws, then Alaska would not have had standing to challenge the specific DOT rules, because Alaska's injury, the inability to enforce its deceptive advertising laws, would not be redressed by a striking down of the DOT rules. In other words, the Court's holding was premised on the assumption that only *conflict* preemption was at issue, and that there was no express or implied preemption of *all* state advertising laws under § 105(a)(1). 868 F.2d at 444 ("The 1988 [DOT] Orders . . . provide the only possible basis for preemption of state regulation . . . . )



## CONCLUSION

For the foregoing reasons, the amici States respectfully request the decision of the United States Court of Appeals for the Fifth Circuit be reversed.

Dated: Honolulu, Hawaii, January 13, 1992.

Respectfully submitted,

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